

United States v. Perez, No. 07-10207

APR 01 2008

TALLMAN, Circuit Judge, concurring in part and dissenting in part:

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

I agree there was no error in admission of the unsigned transcript of the sworn testimony of the material witness when it was later discovered that the video recorder had malfunctioned. The admission of expert testimony relating to the organization of alien smuggling operations was harmless error. *See United States v. Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007). On cross-examination, Agent McHugh admitted that there was no evidence connecting Perez to a large-scale alien smuggling operation. This concession eliminated any prejudicial effect his testimony may have had on the jury.

The defense was that Perez was just a good Samaritan who offered lost and hungry aliens a ride to civilization. But the jury heard powerful evidence that instead of yielding to their lights and siren, Perez fled from Border Patrol agents at times reaching speeds of between 80 to 85 miles an hour. When the vehicle became disabled, Perez continued his flight on foot, leading a Border Patrol agent over two barbed wire fences, across an interstate highway, and over an eight-foot chain linked fence before he was captured.

In both *United States v. Pineda-Torres*, 287 F.3d 860 (9th Cir. 2002), and *United States v. Vallejo*, 237 F.3d 1008 (9th Cir. 2001), there was apparently no evidence that the defendants knew they were transporting illegal contraband. On

this record it belies common sense to suggest a jury would find otherwise when the government presented such strong evidence that Perez either knew, or was in reckless disregard of the fact, that his cargo consisted of illegal aliens. Why else would he run? Based on this evidence I am convinced it is more probable than not that any error did not materially affect the verdict.

I respectfully dissent.